

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[Region II Docket No. NY44-215, FRL-_____]

Approval and Promulgation of Implementation Plans; New York;
Nitrogen Oxides Budget and Allowance Trading Program;

AGENCY: Environmental Protection Agency.

ACTION: Proposed rule.

SUMMARY: The Environmental Protection Agency (EPA) is proposing to approve a State Implementation Plan (SIP) revision submitted by the State of New York. This SIP revision responds to the EPA's regulation entitled, "Finding of Significant Contribution and Rulemaking for Certain States in the Ozone Transport Assessment Group Region for Purposes of Reducing Regional Transport of Ozone," otherwise known as the "NOx SIP Call." The SIP revision includes a narrative and a regulation that establish a statewide nitrogen oxides (NOx) budget and a NOx allowance trading program that begins in 2003 for large electricity generating and industrial sources.

The intended effect of this SIP revision is to reduce emissions of NOx in order to help attain the national ambient air quality standard for ozone. EPA is proposing this action pursuant to section 110 of the Clean Air Act.

DATES: EPA must receive written comments on or before [Insert date 30 days from date of publication in the Federal Register].

ADDRESSES: All comments should be addressed to: Raymond Werner, Chief, Air Programs Branch, Environmental Protection Agency, Region II Office, 290 Broadway, 25th Floor, New York, New York 10007-1866.

Copies of the State submittal and other information are available at the following addresses for inspection during normal business hours:

Environmental Protection Agency, Region II Office, Air Programs Branch, 290 Broadway, 25th Floor, New York, New York 10007-1866.

New York State Department of Environmental Conservation, Division of Air Resources, 50 Wolf Road, Albany, New York 12233.

FOR FURTHER INFORMATION CONTACT: Ted Gardella at (212) 637-3892 for general questions, Rick Ruvo at (212) 637-4014 for specific questions on the Trading Program, or Raymond Forde at (212) 637-3716 for specific questions on the Budget Demonstration; Air Programs Branch, Environmental Protection Agency, 290 Broadway, 25th Floor, New York, New York 10007-1866.

SUPPLEMENTARY INFORMATION:

Overview

The Environmental Protection Agency (EPA) is proposing to approve the New York State Department of Environmental Conservation's (New York's) NOx SIP Call State Implementation Plan (SIP) revision. The following table of contents describes the format for this SUPPLEMENTARY INFORMATION section:

I. EPA's Action

- A. What action is EPA proposing today?
- B. Why is EPA proposing this action?
- C. What are the NOx SIP Call general requirements?
- D. What is the NOx Budget and Allowance Trading Program?
- E. What guidance did EPA use to evaluate New York's program?
- F. What is the result of EPA's evaluation of New York's program?

II. New York's NO_x Budget Program

- A. What is New York's NO_x Budget Demonstration?
- B. What is New York's NO_x Budget Trading Program?
- C. What is the Compliance Supplement Pool?
- D. How does New York's program protect the environment?
- E. How will New York and EPA enforce the program?
- F. When did New York propose and adopt the program?
- G. When did New York submit the SIP revision to EPA and what did it include?
- H. What other significant items relate to New York's program?
- I. Impact of D.C. Circuit Court remand on New York's NO_x SIP Call submittal.
- J. What is the relationship of today's proposal to EPA's findings under the section 126 rule?

III. Proposed Action

IV. Administrative Requirements

I. EPA's Action

- A. What action is EPA proposing today?

EPA proposes approval of revisions to New York's ground level ozone SIP which New York submitted on April 3, 2000 and April 18, 2000. These SIP revisions include a new regulation, 6 NYCRR Part

204, "NOx Budget Trading Program," dated April 3, 2000, and a narrative entitled, "New York State Implementation Plan For Ozone; Meeting The Statewide Oxides of Nitrogen (NOx) Budget Requirements Contained In The NOx SIP Call (63 FR 57356, October 27, 1998)," dated April 18, 2000 and supplemented on May 16, 2000. New York submitted the regulation and narrative, including NOx reducing measures, in order to strengthen its one-hour ozone SIP and to comply with the NOx SIP Call during each ozone season, i.e., May 1 through September 30, beginning in 2003. EPA proposes that New York's submittal is fully approvable as a SIP strengthening measure for New York's one-hour ground level ozone SIP and EPA has determined it meets the air quality objectives of EPA's NOx SIP Call requirements. New York's SIP revision also satisfies Phase III of the Ozone Transport Commission's NOx Budget Program as discussed in section II.H. of this document.

B. Why is EPA proposing this action?

EPA is proposing this action in order to:

- Approve a control program which reduces NOx emissions, a precursor of ozone, and which therefore helps to achieve the national ambient air quality standard for ozone,
- C Fulfill New York's and EPA's requirements under the Clean Air Act (the Act),

- C Make New York's NOx allowance trading regulation federally enforceable and available for credit in the SIP,
- C Make New York's SIP narrative, including the ozone season NOx budget, federally enforceable as part of the New York SIP, and
- C Give the public an opportunity to submit written comments on EPA's proposed action, as discussed in the DATES and ADDRESSES sections.

C. What are the NOx SIP Call general requirements?

On October 27, 1998, EPA published a final rule entitled, "Finding of Significant Contribution and Rulemaking for Certain States in the Ozone Transport Assessment Group Region for Purposes of Reducing Regional Transport of Ozone," otherwise known as the "NOx SIP Call." See 63 FR 57356. At that time, the NOx SIP Call required 22 states and the District of Columbia¹ to meet statewide NOx emission budgets during the five month period from May 1 through September 30 in order to reduce the amount of ground level ozone that is transported across the eastern United States. The NOx SIP Call set out a schedule that required the

¹ Alabama, Connecticut, District of Columbia, Delaware, Georgia, Illinois, Indiana, Kentucky, Massachusetts, Maryland, Michigan, Missouri, North Carolina, New Jersey, New York, Ohio, Pennsylvania, Rhode Island, South Carolina, Tennessee, Virginia, Wisconsin, and West Virginia.

affected states to adopt regulations by September 30, 1999, and to implement control strategies by May 1, 2003².

The NOx SIP Call allowed states the flexibility to decide which source categories to regulate in order to meet the statewide budgets. However, the SIP Call notice suggested that imposing statewide NOx emissions caps on large fossil-fuel fired industrial boilers and electricity generators would provide a highly cost-effective means for states to meet their NOx budgets. In fact, the state-specific budgets were derived using an emission rate of 0.15 pounds NOx per million British thermal units (lb. NOx/mmBtu) at electricity generating units (EGUs) with a nameplate capacity greater than 25 megawatts, multiplied by the projected heat input (mmBTU) from burning the quantity of fuel needed to meet the 2007 forecast for electricity demand. See 63 FR 57407. The calculation of the 2007 EGU emissions was based on an emissions trading program used to achieve part of an EGU control program. The NOx SIP Call state budgets also assumed on average a 30% NOx reduction from cement kilns, a 60% reduction

² On May 25, 1999, the D.C. Circuit issued a partial stay of the submission of the SIP revisions required under the NOx SIP Call. The NOx SIP Call had required submission of the SIP revisions by September 30, 1999. State Petitioners challenging the NOx SIP Call moved to stay the submission schedule until April 27, 2000. The D.C. Circuit issued a stay of the SIP submission deadline pending further order of the court. *Michigan v. EPA*, No. 98-1497 (D.C. Cir. May 25, 1999) (order granting stay in part).

On April 3rd and 18th, 2000, New York voluntarily submitted this revision to EPA for approval notwithstanding the court's stay of the SIP submission deadline. On March 3, 2000, the D.C. Circuit ruled on *Michigan v. EPA*, affirming many aspects of the SIP Call and remanding certain other portions to the Agency. On June 22, 2000, the DC Circuit upheld EPA's NOx SIP Call. This allows EPA to move forward on a fixed schedule to reduce NOx emissions. The court's previous rulings did not affect this action because it was submitted and is being proposed as a SIP-strengthening measure regardless of the status of the case.

from industrial boilers and combustion turbines, and a 90% reduction from internal combustion engines. The non-EGU control assumptions were applied to units where the heat input capacities were greater than 250 mmBtu per hour, or in cases where heat input data were not available or appropriate, to units with actual emissions greater than one ton per day.

To assist the states in their efforts to meet the SIP Call, the NOx SIP Call final rulemaking included a model NOx allowance trading regulation, called "NOx Budget Trading Program for State Implementation Plans," (40 CFR part 96), that could be used by states to develop their regulations. The NOx SIP Call rule explained that if states developed an allowance trading regulation consistent with the EPA model rule, they could participate in a regional allowance trading program that would be administered by the EPA. See 63 FR 57458-57459.

D. What is the NOx Budget and Allowance Trading Program?

EPA's model NO_x budget and allowance trading rule for SIPs, 40 CFR part 96, sets forth a NOx emissions trading program for large EGUs and non-EGUs. A state can voluntarily choose to adopt EPA's model rule in order to allow its sources to participate in regional allowance trading. The October 27, 1998 Federal

Register notice contains a full description of the EPA's model NO_x budget trading program. See 63 FR 57514 - 57538 and 40 CFR part 96.

In general, air emissions trading uses market forces to reduce the overall cost of compliance for pollution sources, such as power plants, while achieving emission reductions and environmental benefits. One type of market-based program is an emissions budget and allowance trading program, commonly referred to as a "cap and trade" program.

In an emissions budget and allowance trading program, the state or EPA sets a regulatory limit, or emissions budget, in mass emissions from a specific group of sources. The budget limits the total number of allocated allowances during a particular control period. When the budget is set at a level lower than the current emissions, the effect is to reduce the total amount of emissions during the control period. After setting the budget, the state or EPA then assigns, or allocates, allowances to the participating entities up to the level of the budget. Each allowance permits the emission of a quantity of pollutant, e.g., one ton of airborne NO_x.

At the end of the control period, each source must demonstrate that its actual emissions during the control period were less than or equal to the number of available allowances it holds. Sources that reduce their emissions below their allocated allowance level may sell their extra allowances. Sources that emit more than the amount of their allocated allowance level may buy allowances from the sources with extra reductions. In this way, the budget is met in the most cost-effective manner. An example of a budget and allowance trading program is EPA's Acid Rain Program for reducing sulfur dioxide emissions.

E. What guidance did EPA use to evaluate New York's program? EPA evaluated New York's NO_x SIP Call submittal using EPA's "NO_x SIP Call Checklist," (the checklist), issued on April 9, 1999. The checklist summarizes the requirements of the NO_x SIP Call set forth in 40 CFR 51.121 and 51.122. The checklist, developed from the basic requirements of the formal SIP Call Federal Register action (63 FR 57356), outlines the criteria that the EPA Regional Office used to determine the completeness and approvability of New York's submittal.

As noted in the checklist, the key elements of an approvable submittal under the NO_x SIP Call are: a budget demonstration;

enforceable control measures; legal authority to implement and enforce the control measures; adopted control measure compliance dates and schedules; monitoring, recordkeeping, and emissions reporting; as well as elements that apply to states that choose to adopt an emissions trading rule in response to the NOx SIP Call. The checklist is available to the public on EPA's website at: <http://www.epa.gov/ttn/otag/sip/related.html>.

As described above, the final NOx SIP Call rule included a model NOx budget trading regulation. See 40 CFR part 96. EPA used the model rule to evaluate New York's Part 204. Additionally, EPA used the October 1998 final NOx SIP Call rulemaking, as well as the subsequent technical amendments to the NOx SIP Call, published in May 1999 (64 FR 26298) and March 2000 (65 FR 11222), in evaluating the approvability of New York's submittal. EPA also used section 110 of the Act, "Implementation Plans," to evaluate the approvability of New York's submittal as a revision to the SIP.

F. What is the result of EPA's evaluation of New York's program?

EPA has evaluated New York's NOx SIP Call submittal and proposes to find it approvable. The April 3, 2000 and April 18, 2000 submittals will strengthen New York's SIP for reducing ground level ozone by providing NOx reductions beginning in 2003. EPA proposes to find that the NOx control measure, Part 204, as well as the SIP narrative that includes New York's 2007 NOx baseline and controlled budgets, are approvable. EPA finds that the submittal contained the information necessary to demonstrate that New York has the legal authority to implement and enforce the control measures, as well as a description of how the state intends to use the compliance supplement pool. Furthermore, EPA proposes to find that the submittal demonstrates that the compliance dates and schedules, and the monitoring, record keeping and emission reporting requirements will be met.

Although provisions in New York's control regulation, Part 204, differ slightly from EPA's NOx Budget Trading Model Rule, EPA finds that Part 204 is consistent with EPA's guidance and meets the requirements of the NOx SIP Call, including those found in 40 CFR part 51, §51.121 and §51.122 and 40 CFR part 96, as well as the general SIP submittal requirements of the Act, section 110, 42 U.S.C. 7401 et seq. The most notable differences between the EPA's model rule and New York's control regulation are related to

the applicability of Part 204 to Portland cement kilns and smaller electricity generating sources than the model rule, and the use of a different method for allocating NOx allowances. These differences are acceptable since Part 204 conforms with the timing requirements for submitting the allocations to EPA.

While Part 204 contains provisions which differ slightly from the model rule, these deviations are limited to the acceptable deviations under §51.121(p)(2). Therefore New York's Part 204 is approvable as satisfying the same portion of New York's NOx emission reduction obligations as the State projects the regulation will satisfy. See 63 FR 57495-57496.

EPA is proposing to approve New York's Part 204, and provides the following clarification with respect to exempted NOx Budget units. New York's Part 204-1.5 contains provisions dealing with the shutdown and/or change in physical characteristics of a NOx Budget unit and allows units which shutdown to re-enter the trading program as new sources or as opt-in sources if they change their physical characteristics such that they no longer are NOx Budget units. Therefore, New York should ensure that when the State computes future budget demonstrations, the emissions which account for shutdown and modified units are not

combined with emissions from these new sources or with the emissions from uncontrolled source categories.

For example, allowing shutdown units to re-enter the Program without reducing the budget will decrease the tons of emissions reductions. The units' emissions would still be included in the trading program budget and allocated to other NOx Budget units, thereby requiring fewer tons of reduction from all other NOx Budget units. Similarly, New York's Part 204-1.4(b) provides for units which emit less than 25 tons of NOx per ozone season to be exempted from the trading program. However, New York does not reduce the trading program budget by the NOx emission limitation which again creates the potential for misinterpreting its emissions during a future budget determination. In this case, the unit's emissions could be counted in both the trading program budget and the uncontrolled source categories. In its budget demonstration, New York is responsible for accounting for the emissions reductions which it would have obtained from any shutdown or modified units.

Regarding New York's SIP narrative, EPA finds that the submittal contains the required elements, including: the baseline inventory of NOx mass emissions from EGUs, non-EGUs, area, highway and non-

road mobile sources in the year 2007; the 2007 projected inventory (budget demonstration) reflecting NO_x reductions achieved by the state control measures contained in the submittal; and the commitment to meet the annual, triennial and 2007 state reporting requirements. EPA further finds that New York's 2007 projected inventory, reflecting the control strategies, is approvable, reflecting the air quality objectives of the NO_x SIP Call.

For additional information regarding EPA's evaluation of New York's SIP Call submittal, the reader should refer to the document entitled, "Technical Support Document for New York's NO_x SIP Call Submittal," dated October 3, 2000. Copies of the technical support document can be obtained at either of the addresses listed in the ADDRESSES section of this notice.

II. New York's NO_x Budget Program

A. What is New York's NO_x Budget Demonstration?

New York's April 18, 2000 SIP submittal, as supplemented on May 16, 2000, includes New York's SIP narrative entitled, "New York State Implementation Plan For Ozone; Meeting The Statewide Oxides of Nitrogen (NO_x) Budget Requirements Contained In The NO_x SIP Call (63 FR 57356, October 27, 1998)," that contains a statewide

NOx emissions budget for the 2007 ozone season. Combined with New York's new regulation, Part 204, "NOx Budget Trading Program," the narrative demonstrates that the statewide NOx budget will be met in 2007.

The NOx SIP Call contained EPA calculations of baseline NOx emissions for the year 2007 for stationary point sources that are EGUs, stationary point sources that are non-EGUs, area sources, and mobile sources (both nonroad and highway). New York's SIP submittal incorporated EPA's 2007 baseline inventory.

To achieve the statewide budget, New York is relying on the expected NOx reductions from Part 204. Part 204 applies to all EGUs with nameplate electricity generating capacities equal to or greater than 15 megawatts that sell any amount of electricity, non-EGU units that have a maximum design heat input capacity equal to or greater than 250 mmBtu per hour, as well as Portland cement kilns with maximum design heat inputs equal to or greater than 250 mmBtu per hour.

Below is a table of the 2007 baseline, 2007 budget, and projected 2007 emission levels that New York has submitted with its NOx SIP Call submittals. The 2007 baseline and budget emissions in the

following table are identical to the emission levels published by EPA in the March 2000 technical amendment. EPA has reviewed and agrees with New York's procedures for determining the 2007 projected emissions and reductions and therefore, EPA expects that New York's 2007 statewide budget will be achieved.

Source Category	EPA's 2007 Baseline NOx Emissions for NY (tons/season)	EPA's 2007 NOx Budget Emissions for NY (tons/season)	NY's 2007 Projected Emissions (tons/season)	NY's 2007 Projected Reductions (tons/season)
EGUs	39,199	31,036	30,589 (30,405 cap from trading program)	8,610
Non-EGU Point	32,678	25,477	25,185 (10,945 cap from trading program)	7,493
Area Sources	17,423	17,423	17,423	0
Non-Road Mobile	42,091	42,091	42,091	0
Highway Mobile	124,261	124,261	124,261	0
NY Total	255,652	240,288	239,549	16,103

B. What is New York's NO_x Budget Trading Program?

In response to the NOx SIP Call, New York adopted Part 204, "NOx Budget Trading Program." With Part 204, New York established a NOx cap and allowance trading program for the ozone seasons of 2003 and beyond. New York developed the regulation in order to reduce NOx emissions and allow its sources to participate in the

kind of interstate NOx allowance trading program described in §51.121(b)(2).

Under Part 204, New York allocates NOx allowances to its EGUs and large industrial units, including Portland cement kilns. Each NOx allowance permits a source to emit one ton of NOx during the seasonal control period. NOx allowances may be bought or sold. Unused allowances may also be banked for future use, with certain limitations. For each ton of NOx emitted in a control period, EPA will remove one allowance from the source's NOx Allowance Tracking System (NATS) account. Once the allowance has been retired in this way, no one can ever use the allowance again.

Source owners will monitor their NOx emissions by using systems that meet the requirements of 40 CFR part 75, subpart H, and report resulting data to EPA electronically. Each budgeted source complies with the program by demonstrating at the end of each control period that actual emissions do not exceed the amount of allowances held for that period. However, regardless of the number of allowances a source holds, it cannot emit at levels that would violate other Federal or state limits, for example, reasonably available control technology (RACT), new

source performance standards, or Title IV (the Federal Acid Rain program).

As described above, Part 204 differs from EPA's NOx model budget trading rule in two notable ways. Specifically, Part 204 includes Portland cement kilns and smaller electricity generating sources than the model rule. Also, Part 204 uses a different method for allocating NOx allowances. Refer to section I.F. of this document for more details.

C. What is the Compliance Supplement Pool?

To provide additional flexibility for complying with emission control requirements associated with the NOx SIP Call, the final NOx SIP Call provided each affected state with a "compliance supplement pool." The compliance supplement pool is a quantity of NOx allowances that may be used to cover excess emissions from sources that are unable to meet control requirements during the 2003 and 2004 ozone season. Allowances from the compliance supplement pool will not be valid for compliance past the 2004 ozone season. The NOx SIP Call included these voluntary provisions in order to address commenters' concerns about the possible adverse effect that the control requirements might have on the reliability of the electricity supply, or on other

industries required to install controls as the result of a state's response to the SIP Call.

A state may issue some or all of the compliance supplement pool via two mechanisms. First, a state may issue some or all of the pool to sources with credits from implementing NOx reductions beyond all applicable requirements after September 30, 1999 but before May 1, 2003 (i.e., early reductions). In this way, sources that cannot install controls prior to May 1, 2003, can purchase other sources' early reduction credits in order to comply. Second, a state may issue some or all of the pool to sources that demonstrate a need for an extension of the May 1, 2003 compliance deadline due to undue risk to the electricity supply or other industrial sectors, and where early reductions are not available. See 40 CFR 51.121(e)(3).

Part 204 provides for the distribution of supplementary allowances by the early reduction credit methodology but not the direct distribution methodology. The distribution of early reduction credits are available to sources that implement NOx reductions beyond applicable requirements after September 30, 1999 but before May 1, 2003. Under Part 204, New York will only provide early reduction credits to those sources holding banked

allowances that were allocated in 2000, 2001, and 2002, under New York's Ozone Transport Commission's (OTC's) Memorandum of Understanding (MOU). Subpart 227-3 contains New York's SIP approved OTC's regional NOx cap and allowance trading program. See 65 FR 20905, April 19, 2000.

Part 204 specifies New York's compliance supplement pool to be 2,370 allowances whereas EPA's March 2000 technical amendment allows for 2,764 allowances. If New York wants to take advantage of this increased share of the pool, New York should amend Part 204 to 2,764 tons and submit it as a SIP revision for EPA approval. Also, should EPA subsequently revise New York's compliance supplement pool amount through rulemaking, New York should amend Part 204 and submit it as a SIP revision for EPA approval.

D. How does New York's program protect the environment?

New York's revised NOx SIP Call submittal is expected to result in about 6.3% reduction in NOx from New York's total 2007 baseline ozone season inventory and about 22.4% reduction in NOx from the EGUs and non-EGUs affected by Part 204. After reviewing air quality modeling assessments performed for the NOx SIP Call, EPA has determined that the NOx reductions in New York and other

states subject to the SIP Call will reduce the transport of ozone starting in 2003.

Besides ozone air quality benefits, decreases of NO_x emissions will also help improve the environment in several other important ways. Decreases in NO_x emissions will decrease acid deposition, nitrates in drinking water, excessive nitrogen loadings to aquatic and terrestrial ecosystems, and ambient concentrations of nitrogen dioxide, particulate matter and toxics. On a global scale, decreases in NO_x emissions reduce greenhouse gases and stratospheric ozone depletion.

E. How will New York and EPA enforce the program?

Once approved into New York's SIP, both New York and EPA will be able to enforce the requirements of the NO_x budget and allowance trading program in Part 204. All of the sources subject to the NO_x allowance trading program will have federally-enforceable operating permits that contain source specific requirements, such as emission allowances, emissions monitoring or pollution control equipment requirements. New York and EPA will be able to enforce the source specific requirements of those permits.

In order to determine compliance with the emission requirements of the program, at the end of each ozone season, New York and EPA will compare sources' allowance and actual emissions. The allowances are tracked using the NOx Allowance Tracking System (NATS). To be in compliance, sources must hold a number of available allowances that meets or exceeds the number of tons of NOx actually emitted by that source and recorded in the NOx Emissions Tracking System (NETS) for a particular ozone season. For sources with excess emissions, penalties include EPA deducting three times the unit's excess emissions from the unit's allocation for the next control period.

F. When did New York propose and adopt the program?

New York published public notices on June 30, 1999 and February 16, 2000 to announce the availability of the proposed Part 204 and the SIP narrative, that included the statewide 2007 NOx emission budget, respectively. The public notices opened 30-day public comment periods. New York held public hearings on the proposed regulation on August 2 and 3, 1999 and on the SIP narrative on March 20 and 21, 2000. After modifying the proposal in response to public comment, New York filed the final Part 204 on January 26, 2000 with the Department of State. The regulation became effective at the State level on February 25, 2000.

G. When did New York submit the SIP revision to EPA and what did it include?

New York submitted Part 204 and the SIP narrative to EPA, on April 3, 2000 and April 18, 2000 respectively, with a request to revise the New York SIP. On July 11, 2000, EPA sent a letter to New York finding the SIP submittals technically and administratively complete.

New York's SIP submittals include the following:

- C Adopted control measures which require emission reductions beginning in 2003; Part 204, "NOx Budget Trading Program;"
- C A baseline inventory of NOx mass emissions from EGUs, non-EGUs, area, highway and non-road mobile sources in the year 2007, as part of New York's SIP narrative;
- C A 2007 projected inventory (budget demonstration) reflecting NOx reductions achieved by the state control measures contained in the submittal, as part of New York's SIP narrative;
- C A description of how the State intends to use the compliance supplement pool, as part of New York's SIP narrative and in Part 204;

C A commitment to meet the annual, triennial, and 2007 reporting requirements, as part of the SIP narrative.

H. What other significant items relate to New York's program?

In addition to submitting the April 2000 SIP package in order to fulfill its NO_x SIP Call obligation, New York adopted Part 204 as part of its one-hour ozone attainment plans for the ozone nonattainment areas of the State. The attainment plans rely on the NO_x reductions associated with Part 204 in 2003 and beyond. EPA proposed approval of New York's attainment plans for ozone nonattainment areas on December 16, 1999. See 64 FR 70364. Approval and implementation of Part 204 is relied on in order for New York to attain the one-hour ozone standard.

Part 204 is also related to the Ozone Transport Commission's (OTC's) ozone season NO_x budget program. On September 27, 1994, OTC adopted a Memorandum of Understanding (MOU) that committed the signatory states, including New York, to the development and proposal of a region-wide reduction in NO_x emissions. The OTC agreement committed the states to one phase of reductions by 1999 and another phase of reductions by 2003.

As a signatory state of the MOU, New York adopted its NO_x budget and allowance trading regulation, Subpart 227-3, on January 12, 1999.

Subpart 227-3 contained a NO_x emissions budget and allowance trading system for the ozone seasons of 1999 through 2002, the period known as "OTC Phase II." EPA approved New York's Phase II OTC NO_x budget regulation on April 19, 2000. See 65 FR 20905. Although the OTC MOU obligations are not Federal requirements, Part 204 can be viewed as satisfying the "OTC Phase III" program requirements for the ozone seasons beginning in 2003 and beyond.

I. Impact of D.C. Circuit Court remand on New York's NO_x SIP Call submittal.

On March 3, 2000, the D.C. Circuit ruled on *Michigan v. EPA*, affirming many aspects of the NO_x SIP call and remanding certain other portions to the Agency (e.g., the definition of an EGU and the control assumptions for internal combustion engines).

Because of the litigation, the States' deadline for submitting their SIP revisions was extended, and as a result, by order dated August 30, 2000, the Court also extended the deadline for implementation of the required SIP revisions from May 1, 2003 to May 31, 2004. Due to the Court's remanding of the EGU definition and IC engine control assumptions, EPA must now recalculate the

final 2007 baseline, 2007 budget, and compliance supplement allocation for each state subject to the NOx SIP Call, including New York. The Agency expects to publish those recalculated budgets in the next few months. However, this means that although EPA is proposing to approve New York's SIP submittal as meeting the air quality objectives of the NOx SIP Call published to date, New York may be required to make minor adjustments to its NOx SIP Call program due to potential forthcoming changes to the NOx SIP Call requirements. At such time as EPA publishes new emission budget requirements, EPA will inform New York and other states subject to the NOx SIP Call as to what if any changes are needed.

J. What is the relationship of today's proposal to EPA's findings under the section 126 rule?

In the January 18, 2000 section 126 rule (65 FR 2674), EPA granted, in part, petitions submitted by Connecticut, Massachusetts, New York, and Pennsylvania under the 1-hour ozone standard. The EPA made findings that large EGUs and large non-EGUs located in the District of Columbia and 12 states, including a portion of New York, are significantly contributing to nonattainment problems in one or more of the petitioning states. The January 18, 2000 rule established Federal emissions limits

for the affected sources in the form of tradable NO_x allowances and required these sources to reduce NO_x emissions by May 1, 2003.

The section 126 rule provides that if a state submits, and EPA fully approves, a SIP revision meeting the requirements of the NO_x SIP call, the section 126 findings and associated control requirements would automatically be revoked for sources in that state. See 40 CFR 52.34(i). As discussed in the preamble to the section 126 rule (65 FR 2682-2684), the premise for the automatic withdrawal provision was that once a SIP (or Federal Implementation Plan (FIP)) controls the full amount of significant contribution from a state, the section 126 sources in that state could no longer be significantly contributing to downwind nonattainment, and hence the basis for the section 126 findings would no longer be present. Moreover, the provision would ensure that the downwind states receive the emission reduction benefits they are entitled to under section 126 by May 1, 2003, either under the section 126 rule or under a federally enforceable SIP or FIP. See 65 FR 2684. Thus, EPA's rationale for adopting the automatic withdrawal provision depended upon a May 1, 2003 compliance date for sources under the SIP that would substitute for the control remedy under section

126. Accordingly, EPA interpreted section 52.34(i) to apply only where EPA approves a SIP revision (or promulgates a FIP) meeting the full requirements of the NOx SIP call and including a May 1, 2003 compliance date for sources³. See 65 FR 2683.

As discussed in section II.I. of this proposal, the EPA is currently revising certain portions of the NOx SIP call in response to a March 3, 2000 decision by the U.S. Court of Appeals for the D.C. Circuit. See Michigan v. EPA, 213 F.3d 663 (D.C. Cir. 2000). In this decision, the court upheld the NOx SIP call on all major issues, but remanded four narrow issues to EPA for further rulemaking. EPA expects to issue soon a proposal to address the remanded issues, which will slightly modify the NOx SIP budgets based on the court's decision. In light of the changes necessary to respond to the court decision, EPA anticipates that the final NOx SIP budgets would be no more stringent than the original SIP budgets as modified by the March 2, 2000 technical amendment which modified the NOx emission budgets for each affected state. See 65 FR 11222. Therefore, a SIP meeting the March 2, 2000 budgets and providing for reductions by May 1, 2003, should fully address the significant

³ On August 30, 2000, in response to a motion from industry, the Court extended the NOx SIP call compliance deadline for sources until May 31, 2004. The court's decision does not affect any state that chooses to submit a SIP revision which includes an earlier compliance deadline.

NOx transport from that state, and therefore section 52.34(i) would apply to automatically withdraw the section 126 requirements for sources in that state.

In today's action, EPA is proposing to approve the New York NOx SIP revision as meeting the full NOx SIP Call, and including a May 1, 2003 compliance date. Therefore, if the SIP revision is fully approved as proposed, the section 126 requirements will automatically be withdrawn for sources in the State pursuant to 40 CFR 52.34(i).

III. Proposed Action

EPA has reviewed New York's April 3, 2000 and April 18, 2000 SIP submittals, including New York's May 16, 2000 supplement, using the NOx SIP Call rulemaking notices and checklist. EPA has reviewed New York's control measures and projected reductions and finds them approvable. Therefore, EPA proposes approval of Part 204 and the SIP narrative into the New York SIP at this time.

EPA is soliciting public comments on the issues discussed in this proposal or on other relevant matters. EPA will consider these comments before it takes final action. Interested parties may participate in the Federal rulemaking procedure by submitting

written comments to the EPA Regional office listed in the ADDRESSES section of this action.

IV. Administrative Requirements

Under Executive Order 12866 (58 FR 51735, October 4, 1993), this action is not a "significant regulatory action" and therefore is not subject to review by the Office of Management and Budget. This action merely approves state law as meeting Federal requirements and imposes no additional requirements beyond those imposed by state law. Accordingly, the Regional Administrator certifies that this rule will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 et seq.). Because this rule approves pre-existing requirements under state law and does not impose any additional enforceable duty beyond that required by state law, it does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Public Law 104-4). For the same reason, this rule also does not significantly or uniquely affect the communities of tribal governments, as specified by Executive Order 13084 (63 FR 27655, May 10, 1998). This rule will not have substantial direct effects on the states, on the relationship between the national government and the

states, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132 (64 FR 43255, August 10, 1999), because it merely approves a state rule implementing a Federal standard, and does not alter the relationship or the distribution of power and responsibilities established in the Clean Air Act. This rule also is not subject to Executive Order 13045 (62 FR 19885, April 23, 1997), because it is not economically significant.

In reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the Clean Air Act. In this context, in the absence of a prior existing requirement for the State to use voluntary consensus standards (VCS), EPA has no authority to disapprove a SIP submission for failure to use VCS. It would thus be inconsistent with applicable law for EPA, when it reviews a SIP submission, to use VCS in place of a SIP submission that otherwise satisfies the provisions of the Clean Air Act. Thus, the requirements of §12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) do not apply. As required by §3 of Executive Order 12988 (61 FR 4729, February 7, 1996), in issuing this rule, EPA has taken the necessary steps to eliminate drafting errors and ambiguity, minimize potential litigation, and

provide a clear legal standard for affected conduct. EPA has complied with Executive Order 12630 (53 FR 8859, March 15, 1988) by examining the takings implications of the rule in accordance with the "Attorney General's Supplemental Guidelines for the Evaluation of Risk and Avoidance of Unanticipated Takings" issued under the executive order. This rule does not impose an information collection burden under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.).

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Intergovernmental relations, Nitrogen dioxide, Ozone, Reporting and recordkeeping requirements.

AUTHORITY: 42 U.S.C. 7401 et seq.

Dated:

Jeanne M. Fox,
Regional
Administrator,
Region 2.

BILLING CODE 6560-50-P